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Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, AND IVA ROGERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS BRIEF BY THE COUNTIES OF MADISON AND ONEIDA, NEW YORK, IN SUPPORT OF THE PETITION

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The Counties of Madison and Oneida, New York ("Counties"), submit this amicus brief in support of the Petition for a Writ of Certiorari of the City of Sherrill, New York, seeking review of *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Counties fully support the arguments advanced by the City of Sherrill in its Petition and by the State of New York in its amicus brief, but would like to bring to this Court's attention additional matters relating to the questions presented.

STATEMENT OF INTEREST

The parcels owned by the Respondent Oneida Indian Nation of New York ("the Oneidas") are within the Counties, as is all of the area claimed by respondent to be Indian country. The Counties are defendants in related actions filed by the Oneidas in the United States District Court for the Northern District of New York.

INTRODUCTORY STATEMENT

The Oneidas were previously before this Court in two related appeals. In *Oneida I*, 414 U.S. 661 (1974), the Court recognized that their complaint alleged a federal claim, *id.* at 677-78; and in *Oneida II,* 470 U.S. 226 (1985), they sought to affirm a judgment for $16,694 plus interest representing two years of rent on 872 acres of land owned by the Counties. The judgment was affirmed, although the majority joined with the United States in recognizing "the potential consequences" of the Court's decision. *Id.* at 253. The Court was apparently sufficiently troubled that it expressly disclaimed any "opinion as to whether other considerations [specifically including equitable] may be relevant to the final disposition . . .." *Id.* at 253 n.27. Neither this Court nor the United States as amicus curiae, however, foresaw that the Oneidas would claim the right to treat as Indian country and assert political jurisdiction over a large area in central New York State without any action or superintendence by the United States. The dissent presciently noted:

> This decision upsets long-settled expectations in the ownership of real property in the Counties of Oneida and Madison, New York, and the disruption it is sure to cause will confirm the common-law wisdom that ancient claims are best left in repose . . . . The Court, no doubt, believes that it is undoing a grave historical injustice, but in so doing, it has caused another . . . .

Id. at 273.

Since then, the Oneidas have expanded their land claim to 250,000 acres,[1] and attempted to extend the decisions in *Oneida I* and *Oneida II* beyond any fair reading. The Oneidas purchased properties within the land claim area, and unilaterally declared them to be Indian country, not subject to state or local jurisdiction. The City of Sherrill rejected the Oneidas' declaration of sovereignty, resulting in this case in which the lower courts (on summary judgment) made potentially far-reaching decisions in the context of an action to enjoin taxation of two parcels of land by the smallest city in New York. The errors below not only have a potential impact on the Land Claim Case, but also allow the Oneidas unilaterally to eviscerate state and local jurisdiction over land they acquire.

This case raises issues that were not fully presented or addressed in *Oneida II*. For instance, the Court noted, in discussing historical background, that "in 1788, the State entered into a 'treaty' with the Indians, in which it purchased the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres . . . ." *Oneida II*, 470 U.S. at 231. The Court, however, was not asked to determine whether the 1788 Treaty of Fort Schuyler ceded all of the interest of the Oneidas and extinguished their aboriginal title. Lower courts have rejected defenses based on the 1788 Treaty, mistakenly believing the issue is foreclosed by *Oneida II*. *See, e.g.*, *Land Claim Case*, 194 F. Supp. 2d at 121; *Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 234 (N.D.N.Y. 2001). *Oneida II* affirmed a $16,694 judgment entered after a trial at which the Counties – among the weakest in New York – presented no evidence (*see Oneida Indian Nation of New York v. County of Oneida,* 434 F. Supp. 527, 532 (N.D.N.Y. 1977)), holding that the Counties' violated the Oneidas' federal common-law right to possess 872 acres of land, that Congress did not preempt the federal common-law right by virtue of the 1793 Trade and Intercourse Act, and that the Counties' affirmative defenses (statute of limitations, abatement, ratification by the Treaties of 1798 and 1802, and nonjusticiability) did not apply. *Oneida II*, 470 U.S. at 233-250. The issues raised in this case are not foreclosed by *Oneida II*.

Finally, the Counties note that the United States submitted an amicus brief in *Oneida II*, asserting that equitable principles "plainly do apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest . . . ." (Br. for the United States as Amicus in *Oneida II*, at 34 (appended hereto at A1-A2)). In this case, in which the unilateral declaration of Indian country sovereignty raises equitable considerations many times more powerful than a claim for two years' rent, the United States is conspicuously absent.

BACKGROUND

The Counties, created in 1798 and 1806, are located in central New York State and encompass the 300,000 acre ancient Oneida Indian reservation created by the State in the 1788 Treaty of Fort Schuyler. This Court has already noted that the land conveyed by the Oneidas was "converted from

[1] *See, e.g., Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) (the "Land Claim Case"). The Land Claim Case involves the Oneidas' claim to possessory rights to approximately 250,000 acres located in the Counties. Considerable resources have been devoted to fully and comprehensively litigate the issues in that case, which is currently in expert discovery.

wilderness to cities, towns, villages and farms." *Oneida II* at 265-66. Over the past two centuries, the Oneida Indians largely removed from New York. By 1999, the census reported that Indians represented less than 0.3% (907) of the total population of the Counties (304,910).[2] However, in the past ten years the Oneidas, who in the late nineteenth century were no longer known as a tribe in New York and had assimilated into the community, *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877), have purchased in a checkerboard fashion more than 16,000 acres scattered within the Counties without any superintendence or involvement by the United States. Upon acquisition, the Oneidas unilaterally declared the parcels to be Indian country and ceased payment of real property taxes. Emboldened by their reading of *Oneida II*, they also refused to collect and remit taxes on all goods and services sold to non-members of the Tribe even though this Court has ruled such exchanges taxable. *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

This unilateral declaration of sovereignty by less than 0.3% of the population has significantly impacted the remaining 99.7% of the residents of the Counties. The resulting annual tax shortfall for Madison County is approximately $1 million for real property taxes and an estimated $5 million for sales taxes. For Oneida County the annual tax shortfall is $500,000 for real property taxes and an estimated $3-5 million for sales taxes.

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[2] The history and legal significance of the Oneidas' removal from (and assimilation into) New York is discussed by the Counties at length in their amicus Memorandum in Opposition to the Oneida Indian Nation of New York's Motion for Summary Judgment, reproduced in the Joint Appendix filed with the Second Circuit below (hereinafter "JA") at 950-979. Suffice it to say, the United States determined through its agencies that, by the 1890s, the Oneidas had no reservation, were few in number, and were considered citizens of New York. (JA at 964-970).

The refusal to collect sales and excise taxes (which account for approximately 1/3 of the cost of cigarettes and gasoline) has enabled the Oneidas to charge lower prices and place all non-Indian competitors at a disadvantage. To illustrate, in 1997 there were twenty-eight gasoline station / convenience stores in the area, of which the Oneidas owned two. Since then the Oneidas opened two new stores and purchased eight competitors, and six other competitor stores closed. Currently, only ten non-Oneida stores collect and remit taxes while the Oneidas operate twelve "tax free" stores. In Madison County, the combined sales and property tax loss has had the greatest impact on the non-Indian community where the County has had to raise property taxes by 33.8% over the last three years.

The Oneidas' offer to local taxing authorities a substitute for lost taxes called a Silver Covenant Chain Grant. It is little more than a public relations gimmick and a poor substitute for a reliable tax revenue stream since the payments are voluntary and can be discontinued for improper purposes at the whim of the Oneidas. For example, the Oneidas have used these voluntary payments in an attempt to exert improper influence over local government. *See, e.g.*, Press Release of Stockbridge Valley Central School District (Jan. 8, 2004) ("[T]he revocation of the [Silver Covenant Chain] funding appears to have arisen from an intra-tribal dispute that resulted in demands by the Nation's representative, Chuck Fougnier, for the firing of a Native American school employee.") (appended hereto at A3-A5); *see also,* Elizabeth Rinaldo, *SVCS faces budget cuts in wake of grant loss*, Oneida Daily Dispatch, January 12, 2004 at 1 (appended hereto at A6-A9). Moreover, unlike property taxes, the Oneidas' proposed voluntary payments are not based on present assessed value. The notion that these unenforceable payments are better than property taxes, (Br. for Appellees, *City of Sherrill*, Nos. 01-7795, -7797, at 2 (2d Cir.)), should be dismissed out of hand.

In addition to the impact on tax revenues and other taxpayers, the very fabric of the area's governance is severely compromised by the Oneidas' declaration that its patchwork of parcels is sovereign and therefore exempt from state and local law. This includes the network of local and state police powers, environmental protection laws, land use, safety and fire codes, and civil rights protections that evolved over the past two centuries. Basic principles of democracy in effect for hundreds of years – such as electing local leaders to establish and implement comprehensive, integrated policies for the area – are effectively destroyed.

SUMMARY OF THE ARGUMENT

Sherrill's enforcement of its real property tax assessments depends on whether the parcels are, today, within Indian country – notwithstanding the passage of almost two centuries of settlement, cultivation and use pursuant to treaties,[3] willingly made, between New York State and the Oneidas beginning in 1785. In answering this question, the Second Circuit erred by (1) using the wrong legal standard to interpret two critical treaties, and (2) misreading the scope and applicability of the Indian Trade and Intercourse Act, (3) in violation of the Tenth Amendment of the Constitution of the United States.

ARGUMENT

1. The Court of Appeals Used the Wrong Legal Standard to Interpret Two Critical Treaties

According to the Second Circuit, "[t]here is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of Canandaigua." 337 F.3d at 153. In fact, both these matters – the aboriginal status of the land, which was

[3] The federal government approved of New York's purchases and took no action to prevent them. *See Oneida Nation of New York v. United States*, 43 I.C.C. 373, 405 (1978).

extinguished by the 1788 Treaty of Fort Schuyler, and the effect of the 1794 Treaty of Canandaigua – are contested.[4] The Second Circuit erred by improperly construing the applicable treaties generously in favor of the Oneidas.

Although the principle of generous construction is often appropriate when analyzing Indian treaties, it may not be used to divest a state of its land. *United States v. Minnesota*, 270 U.S. 181, 209 (1926); *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1163-64 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); *Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 530 (W.D.N.Y. 2002). This Court held in *Minnesota* that a treaty cannot be construed to divest a state's rights in land "unless the purpose to do so be shown in the treaty with such certainty as to put it beyond reasonable question." *Minnesota*, 270 U.S. at 209. By wrongly applying the doctrine of generous construction, the Second Circuit misinterpreted critical treaties to divest New York State of its property interest in, and jurisdiction over, 300,000 acres of its land. The Second Circuit also ignored contrary interpretations by renowned legal authorities (including this Court) that were given much closer in time to the treaties in question.

a. The 1788 Treaty of Fort Schuyler Between New York and the Oneidas

In a single sentence in a footnote, the Second Circuit below dismissed the argument that the 1788 Treaty of Fort Schuyler (appended hereto at A10-A14) effected a transfer of all of the Oneidas' land to New York, extinguished forever aboriginal title, and created a state reservation. 337 F.3d at 156 n.13. Instead, the Second Circuit interpreted the treaty generously in the Oneidas' favor as "carv[ing]-out" 300,000 acres that "never became state land" and in which aboriginal

[4] *See, e.g.*, JA at 28-29, 55-56, 365, 864-65.

title survived. *Id.*[5] In so holding, the Second Circuit disregarded the rule of construction mandated by *Minnesota*, and its conclusion is inconsistent with the language of the treaty, New York law, and other early authorities.

In its first article, the 1788 Treaty states: "The Oneidas do cede and grant ***all their lands*** to the people of the State of New York ***forever***." (Emphasis added). In the second article, New York set apart for the Oneidas a tract from "the said ceded lands" that was "reserved for . . . several uses," including a portion of which the Oneidas could use and cultivate (but not sell, lease, or alienate in any way), and the balance of which could be leased to others, subject to certain restrictions.

The effect of the plain treaty language was to convey all the Oneidas' land to New York and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption,[6] acquired absolute fee title to "***all*** [the

[5] The district court opinion cited as authority by the Second Circuit likewise misapplied the principle of generous construction. *See Oneida Indian Nation of New York v. State of New York*, 194 F. Supp. 2d 104, 139 (N.D.N.Y. 2002). The district court reached its decision, in part, on the authority of this Court's statement in *Oneida II* that "the Oneidas retained a reservation of about 300,000 acres" under the 1788 Treaty of Fort Schuyler. *Id.* (quoting *Oneida II*, 470 U.S. at 231). This Court's statement, in turn, reflected a finding by the trial court that the Oneidas' "were left with a reservation of about 300,000 acres" as a consequence of the 1788 Treaty of Fort Schuyler. *Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977). The trial court (and the parties) in *Oneida II* appear to have assumed that this "reservation" of land to the Oneidas preserved the Oneidas' aboriginal title, as opposed to extinguishing the Oneidas' original Indian title and granting them a state-law-based property right. *Id.* at 538.

[6] During the confederal period, New York was the sovereign vested with the right of preemption over that area now claimed by the Oneidas. *See, e.g., Oneida II*, 414 U.S. at 670; *Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823).

In the 1786 Treaty of Hartford (also called the Hartford Compact), New York and Massachusetts settled an early dispute over territory and

(Footnote continued on next page)

Oneidas'] lands" when the treaty was made. *See, e.g., Mitchel v. United States*, 34 U.S. 711, 746 (1835) (Indians may abandon, cede or sell their right to possess and occupy their lands, rendering their right extinct and disencumbering the land); *M'Intosh*, 21 U.S. at 588 ("All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."). The text does not support the Second Circuit's generous interpretation that the Oneidas' retained aboriginal title to the land "reserved" for their use. Rather, the 1788 Treaty unambiguously extinguished the Oneidas' aboriginal rights to their entire ancient domain in the first article, while granting them in the next article a state reservation created and defined by New York law.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent),[7] described the treaty as follows:

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ***ceding the whole*** of their vast territory to the people of this State, and ***accepting a retrocession of a part***, upon restricted terms, and with permission only to

(Footnote continued from previous page)
jurisdiction. This treaty confirmed that New York held the rights of "the government, sovereignty and jurisdiction" over the lands within its boundaries, but that Massachusetts owned the right of preemption from the Indians to certain land in western New York (in Seneca territory). *See* 1786 Treaty of Hartford, Arts. I & II (appended hereto at A15-A22).

[7] Chancellor Kent (with the likes of Chief Justices Jay and Marshall) is commonly regarded as a founding father of American jurisprudence. Oliver Wendell Holmes, Jr., in his 1873 Preface to the twelfth edition of *Kent's Commentaries on American Law*, noted that "[t]he great weight attaching to any opinion of Chancellor Kent has been deemed a sufficient reason for not attempting any alteration in his text or notes."

> lease certain parts for a term not exceeding twenty-one years.

Goodell v. Jackson, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Because the 1788 Treaty was a ***New York State*** treaty – and its construction is a question of ***state*** law – the lower courts should have deferred to the construction indicated by *Goodell*. *See, e.g., Bush v. Palm Beach Co. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute.").

Eight years later, Chief Justice Marshall, apparently mindful of *Goodell*, noted that "some tribes" made pre-Constitution treaties with New York State "by which they ***ceded all their lands*** to that state, ***taking back*** a limited grant to themselves, in which they admit their dependence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added). Although Chief Justice Marshall does not specifically identify the Oneidas, he almost certainly had the 1788 Treaty of Fort Schuyler in mind (as well as similar treaties with the Onondaga and Cayuga tribes) as the language of the treaty matches his description in *Cherokee Nation*.

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed in accordance with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. At issue was a claim by Great Britain, on behalf of the Cayuga Indians in Canada, against the United States for annuities. *See* 20 Am. J. Int'l Law 574-594 (1926). The panel found that the Cayugas' aboriginal title to the land had been extinguished, and the lands ceded to New York. *Id.* at 590. Citing *Cherokee Nation*, the panel wrote, "[w]e think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession." *Id.*

In short, the plain language of the treaty, as interpreted by early authorities, compels the conclusion that the Oneidas

ceded "all their lands" to New York – including the parcels at issue in this case – thereby extinguishing their aboriginal title, and accepted a limited grant from New York. The Second Circuit erred by construing the 1788 Treaty of Fort Schuyler as preserving aboriginal title in the retroceded portion of the Oneidas' lands.

b. <u>The 1794 Treaty of Canandaigua Between the United States and the Six Nations</u>

Proceeding from the invalid assumption that the Oneidas retained aboriginal title to a portion of their ancestral lands, the Second Circuit compounded its error by failing to interpret the 1794 Treaty of Canandaigua, 7 Stat. 44, in accordance with *Minnesota* and concluding that it divested the State of its property and created a federal reservation.[8] 337 F.3d at 156. The provisions of the 1794 Treaty, read in historical context, show that no federal reservation was created for the Oneidas. Indeed, the Second Circuit's interpretation of the treaty renders it an illegal, uncompensated taking of state property in violation of the Fifth Amendment of the Constitution of the United States. *See, e.g., Seneca Nation*, 206 F. Supp. 2d at 533-34.

In Article II of the 1794 Treaty, the United States merely "***acknowledge[d]*** the lands reserved to the Oneida, Onondaga and Cayuga Nations, ***in their respective treaties with the state of New York***, and called their reservations, to be their property. . . ." (emphasis added). In addition, the United States asserted that ***it*** would "never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Nothing in the quoted language, or any other article, shows that the treaty's purpose was to divest New York of its interest in the land "with such certainty as to

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[8] Significantly, the State of New York was not a party to the 1794 Treaty of Canandaigua.

put it beyond reasonable question." *Minnesota*, 270 U.S. at 209; *Oneida Indian Nation,* 860 F.2d at 1163-64. This interpretation is consistent with the view expressed by U.S. Attorney General William Wirt that the Treaty of Canandaigua had no effect on the rights of ***New York*** *vis-a-vis* the Oneidas:

> [T]he legal titles of the States of New York and Massachusetts, and of the grantees under them . . . ***are not divested, or in any manner impaired*** by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

Op. Att'y Gen. William Wirt (March 26, 1819) (appended hereto at A23-A28) (emphasis supplied).

The absence of any purpose or intent to create a federal reservation for the Oneidas is confirmed by the treaty's context. As explained below, history reveals that the Seneca nation was the primary reason for – and intended beneficiary of – the 1794 Treaty, not the other tribes of the Six Nations, including the Oneidas. *See Seneca Nation*, 206 F. Supp. 2d at 487. In 1782, New York agreed to cede to the United States its claim to western lands (present-day Ohio and the Erie Triangle). *See id.* at 473. Later, pursuant to the 1784 Treaty of Fort Stanwix, the United States obtained from the Six Nations a release of their claims to these western lands, and, in 1792, patented to Pennsylvania that portion lying west of New York known as the Erie Triangle, in which, among the Six Nations, only the Seneca tribe had an interest. *Id.* at 478-80, 483; William N. Fenton, *The Great Law and the Longhouse* at 646 (1998) (appended hereto at A29-A35). The 1784 Treaty of Fort Stanwix, however, proved over the next decade to be the source of much discontent among the Senecas. *Seneca Nation*, 206 F. Supp. 2d at 480-86. By 1794, Pennsylvania was threatening to force the Senecas out of the Erie Triangle, *see* Fenton, *supra,* at 646-50, and rumors

circulated that the Senecas (and possibly other Iroquois tribes) might join the active warfare between the western Indians and the United States. *Seneca Nation*, 206 F. Supp. 2d at 486. The United States therefore renewed treaty negotiations at Canandaigua. *Id.* at 486-87.

The primary purposes of the 1794 Treaty of Canandaigua were to obtain an express renunciation of rights in the Erie Triangle and reconfirm peace and friendship between the United States and the Six Nations, in particular the Senecas. *Id.* at 490 (*quoting* Letter from Timothy Pickering to Secretary of War Henry Knox of November 12, 1794). Prominently absent from the historical record is any indication of a federal purpose to take New York property and establish "recognized title" in the Oneidas (or other Iroquois nations).

In order to accomplish his mission, Pickering (the federal commissioner to the 1794 Treaty) acknowledged the boundaries of the Seneca nation land in the westernmost part of New York, abutting the Erie Triangle. Pickering baldly stated to Secretary Knox, when transmitting the Treaty, "[y]et not a foot of land has been given up which by the cession then made the U. States had a right to hold: all that I have relinquished falling within the pre-emption right of Massachusetts, and lying within the State of New York." *Id.* In a subsequent letter to Secretary Knox, Pickering confessed "that the United States had no right to the lands which I relinquished" in the 1794 Treaty, and stated, "I felt myself embarrassed . . . by presenting an idea of something very valuable, while, in fact the subject of the relinquishment was a shadow." *Id.* at 492 (*quoting* Letter from Pickering to Secretary Knox of December 26, 1794). He also recognized that the land in question lay "within the jurisdiction of New York," and that "no purchase or sale of lands made of or with the Indians within the limits of that State, could be binding . . . unless made . . . with the consent of the legislature of that State." *Id.* at 491-92. Although Pickering was

speaking of the Senecas, the real-party-in-interest to the 1794 Treaty, *id. at* 487, his understanding certainly applied equally to the Oneidas' state reservation in the center of New York, hundreds of miles east of the Seneca's territory.

In fact, the Oneidas previously took the position that the 1794 Treaty of Canandaigua applied only to lands ceded by New York in 1782 to the United States, and not to lands within the state. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982) ("The Oneidas . . . contend . . . that in any event the Treaty of Canandaigua, which was the last in a series aimed at obtaining Indian cession of Ohio Valley lands to the United States, applies only to the territory that had been in dispute, namely Ohio territorial lands outside the boundaries of the states, not Oneida land in New York."). Similarly, the United States argued in proceedings before the Indian Claims Commission that the Treaty of Canandaigua did not divest New York of its rights or enlarge the rights of the Indians. (Br. of United States in Supp. of Mot. to Consolidate for Summ. J. at 39-53 (appended hereto at A36-A49)).

By failing to apply the *Minnesota* rule of treaty construction and disregarding the historical context, the Second Circuit erred in construing the 1794 Treaty of Canandaigua to effect an illegal, uncompensated taking of New York's property for the benefit of a nominal party-in-interest that, in the past, has disclaimed that interpretation.

2. The Indian Trade and Intercourse Act Does Not Apply To The Properties At Issue.

The Second Circuit further erred by concluding that the Indian Trade and Intercourse Act of 1802, 2 Stat. 139, applied to the properties at issue and operated to preserve the Oneidas' "unextinguished" Indian title. 337 F.3d at 146-47, 157-58. As explained above, Indian title in the parcels at issue was extinguished in 1788, when the Oneidas ceded and granted all their lands to New York and took back a limited property interest. Subsequent conveyances by the Oneidas of

their state reservation to the State, or with the State's approval, are not prohibited by the Indian Trade and Intercourse Act of 1802, or other iterations of the enactment ("ITIA"), because they lie outside its intended reach. *See Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer."); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829).[9]

Although the Second Circuit in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), distinguished *Bates* and *American Fur* and concluded that ITIA was not geographically limited as to land conveyances, *id.* at 627, the Counties submit that this reading is not justified as applied to the present parcels and is inconsistent with the decisions of this Court. It is also contrary to the understanding of early jurists. Before addressing these authorities, we note that then-Justice Rehnquist believed the petition for certiorari in *Mohegan* should have been granted so this Court could decide the scope and applicability of ITIA. *Id.*, 452 U.S. at 971. Over time, the need for review by this Court has become even more clear.

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[9] In addition to *Bates* and *American Fur*, this Court's dicta in *Seneca Nation v. Christy*, 162 U.S. 283 (1896), supports the view that ITIA did not apply to reservation land under the jurisdiction of New York State. In *Oneida I*, the Court cited *Christy* for the proposition that the original 13 states held the right of preemption, but noted that "this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida I*, 414 U.S. at 670, n.6. Based on the allegations, the Court allowed a claim under ITIA, "which put into statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States." *Id.* at 678. In the present litigation, however, it is clear that the Oneidas' Indian title to their lands was extinguished in 1788 before the Constitution became effective and before ITIA was enacted.

In an opinion involving Indian land claims in Florida, this Court suggested that some states continued to have the authority to convey Indian lands, notwithstanding ITIA:

> Grants made by the Indians at public councils ~~have~~ since been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, ***of which there are many instances of large tracts so sold and held, especially in New York***.
>
> It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution ***and yet continues in those where the right to the ultimate fee is owned by the states*** or their grantees.

Mitchel, 34 U.S. at 748 (emphasis added).

Likewise, in *New Jersey v. Wilson*, 11 U.S. 164 (1812), this Court made no mention of ITIA when discussing an 1803 conveyance to private parties by the Delaware Indians of their interest in a tract of land in New Jersey. Invalidating a New Jersey enactment that attempted to revoke the tax exempt status of the tract conveyed, the Court stated:

> It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege [tax exempt status] as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians.

Id. at 167. There is no indication that this Court considered the sale void for violating ITIA.

Attorney General William Wirt observed in 1819 that the states, including New York, stood in "precisely the same ground towards the Indians which the British King occupied" and "[a]s to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place . . . ." Op. Att'y Gen. William Wirt (March 26, 1819).[10] The United States reiterated this position before the Indian Claims Commission in 1955, with the added gloss that the 1794 Treaty of Canandaigua "was an acknowledgement of the then well-known fact that" New York had the right to purchase the Indian lands, and that "the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales . . . ." (Br. of United States in Supp. of Mot. to Consolidate for Summ. J., *supra*, at 47).

Chancellor Kent, in his influential *Commentaries on American Law* ("*Kent's Commentaries*"), observed that "the several local governments, before and since our Revolution, never regarded the Indian nations within their territorial

[10] A June 16, 1795 opinion by Attorney General Bradford is sometimes cited as authority for the proposition that ITIA applied to New York. *See, e.g., Oneida Indian Nation of New York*, 434 F. Supp. at 534. Bradford himself, however, qualified his opinion, noting that "the documents submitted to the Attorney General" did not disclose "circumstances of the case under consideration to take it out of the general prohibition of [ITIA]." Op. Att'y Gen. William Bradford (June 16, 1975) (appended hereto at A50-A51). It is unclear what documents Bradford considered beyond the statute and the treaties between New York and the Oneidas, Cayugas, and Onondagas. In any event, Bradford's opinion (insofar as the Oneidas are concerned) is founded upon the erroneous assumption that the 1788 Treaty of Fort Schuyler failed to extinguish Indian title. *Id.*

domains as subjects," but nonetheless, "asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase." 3 *Kent's Commentaries* 384-85 (14th ed. 1896). Oliver Wendell Holmes, Jr., who edited the twelfth edition of *Kent's Commentaries* early in his career, also apparently believed the ITIA did not apply to Oneida land sales:

> So the Oneida Indians, owning lands in the counties of Oneida and Madison, were enabled, by the act of April 18, 1843, c. 185, to hold lands in severalty, and to sell and convey the same, under the care of a superintendent on the part of the state.

2 *Kent's Commentaries* 73 n.(a). There is no mention in *Kent's Commentaries* that any of the numerous purchases by New York were thought to violate ITIA.

3. It Would Be a Violation of the Tenth Amendment of the Constitution of United States to Deprive New York State of Jurisdiction over Its Own Territory

As discussed above, New York acquired all the Oneidas' land, including the parcels at issue, by virtue of the 1788 Treaty of Fort Schuyler. Although that treaty created a state reservation for the Oneidas, the land was never converted to a federal reservation or otherwise taken by the United States.

The Second Circuit takes the position that New York State does not hold an interest in the reserved property because, "[a]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution." 337 F.3d at 146 (quotations omitted). To the extent that the Second Circuit's opinion affects ***New York State*** lands (not unextinguished aboriginal title), it is in error and violates the concept of State sovereignty preserved by the Tenth Amendment to the Constitution of the United States.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court recently explained that "[a]lthough the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* at 713 (citation omitted). The Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (*quoting* The Federalist No. 45, at 292-293 (J. Madison) (C. Rossiter ed., 1961)). Madison further explained that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States,* 521 U.S. 898, 918 (1997) (*quoting* The Federalist No. 39 at 245 (J. Madison)).

An important component of the concept of State sovereignty is that "a State has plenary powers 'over its own territory. . . .'" *Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) (citation omitted). As discussed above, the 1788 Treaty of Fort Schuyler ceded all Oneida land to New York, which already exercised jurisdiction over them. New York's rights were not divested by the 1794 Treaty of Canandaigua, which merely acknowledged that the Oneida, Cayuga and Onondaga lands had been reserved in state

treaties and that the United States would never claim them. Moreover, New York's property interest could not have been divested by ITIA, as New York State had exercised its sovereign right to extinguish aboriginal title in 1788. Accordingly, under the Constitution and specifically under the concept of State sovereignty made explicit by the Tenth Amendment, the United States cannot deprive New York of jurisdiction over its own territory.

CONCLUSION

For the reasons stated herein, as well as those stated by the City of Sherrill and the State of New York, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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Dated: January 13, 2004

03-855

SUPREME COURT OF THE UNITED STATES

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, AND IVA ROGERS,

Respondents.

APPENDIX

Excerpt from: *Brief for United States as Amicus Curiae* (Supreme Court Nos. 83-1065, 1240, Oct. Terms 1984)..... A1-A2

Press Release of Stockbridge Valley Central School District (January 8, 2004) A3-A5

Elizabeth Rinaldo, *SVCS faces budget cuts in wake of grant loss,* Oneida Daily Dispatch (January 12, 2004)..... A6-A9

1788 Treaty of Fort Schuyler Between New York State and the Oneida Indians..... A10-A14

1786 Treaty (or Compact) of Hartford Between New York States and the Commonwealth of Massachusetts..... A15-A22

Opinion of Attorney General William Wirt (March 26, 1819) A23-A28

Excerpt from: William N. Fenton, *The Great Law and the Longhouse* (1998) A29-A35

Excerpt from: *Brief in Support of United States' Motion to Consolidate for Summary Judgement* (I.C.C. Nos. 300A, 301, 342, 343, 344, 368, July 15, 1955)..... A36-A49

Opinion of Attorney General William Bradford (June 16, 1795)..... A50-A51

Excerpt from: *Brief for United States as Amicus Curiae*
(Supreme Court Nos. 83-1065, 1240, Oct. Terms 1984)

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B. A question remains whether equitable considerations should limit the relief available to the present-day Onezida groups. The Counties interposed such an objection in district court (Supp. Pet. App. 271-301), but they do not appear to have presented it on appeal and they have not presented it for review by this Court. Some consideration of the question is nevertheless appropriate, in our view, in order to illuminate the context in which the issues that are before the Court might be resolved in future cases.

Here, as in *Board of Commissioners v. United States*, 308 U.S. 343, 349 (1939) (a suit to recover taxes improperly levied on Indian land), Congress has not specifically provided for "the nature and extent of relief in case loss is suffered"—in this case, the loss resulting from a void conveyance or wrongful occupation of Indian land. Congress instead has "left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature" (*id.* at 351). Even in [34] suits brought by the United States, then, Congress may be thought to have left the courts free, when fashioning a remedy, to "take into account appropriate considerations of 'public convenience'" (*ibid.*); to give "due regard for local institutions and local interests" (*ibid.*); and to weigh such factors as "unexcused delay," "considerations of fairness," and the relative innocence of the defendant (*id.* at 352-353). But there is no need to consider at this time whether or to what extent these principles apply in suits brought by the Untied States to set aside a void conveyance of tribal land. This is so because, in our view, such principles plainly *do* apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest in

enforcing the prohibitions against unauthorized purchases of tribal land[26] and the tribe itself has sued to repudiate its own prior transaction and asserts its own possessory rights. Cf. *United States v. Hellard*, 322 U.S. 363, 366 (1944).

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[26] The Trade and Intercourse Acts can be said to have established a guardian-ward relationship between the United States and the Indians in a moral or political sense, growing out of the intended federal oversight of Indian land transactions. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 70. But we do not believe that those Acts were understood to establish a "trust" relationship in a legal sense that would *compel* the United States to sue to set aside any conveyance made without the approval of the federal government. Compare *United States* v. *Mitchell*, 445 U.S. 535, 540-546 (1980). Cf. *Nevada v. United States*, slip op. 16-17; but cf. *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975).

Press Release of Stockbridge Valley Central School District
(January 8, 2004)

PRESS RELEASE

January 8, 2004

The Superintendent of Stockbridge Valley School, Dr. Randy C. Richards, today revealed his belief that it was the intention of the Oneida Nation to revoke the $120,000 funding pledged to the School District by the Oneida Indian Nation.

Silver Covenant Funds are monetary awards made by the Nation to the various school districts in the area where Nation land purchases have been made, and resulting in diminished tax revenues available to the districts.

In a press release dated October 11, 1996, describing the Silver Covenant Grants, the Nations said that it created the Education Grants program last January because of its deep belief that its children and the children of its neighbors should receive the highest quality education possible. To assist Oneida Members and the local communities in achieving this goal, the Nation established these voluntary grants, which each school district uses completely at its own discretion, to provide financial aid directly to schools in Oneida and Madison Counties."

Superintendent Richards said the revocation of the funding appears to have arisen from an intra-tribal dispute that resulted in demands by the Nation's representative, Chuck Fougnier, for the firing of a Native American school employee. "This same demand has been made of prior Superintendents in the past who have found no grounds for discipline or discharge of the employee." According to

Superintendent Richards, the District has sought to address the concerns raised by Mr. Fougnier. However, these attempts have not borne fruit. "On December 23rd, I was told by Mr. Fougnier that he would not even meet with me to discuss this matter unless and until we discharged the employee," said Superintendent Richards.

The School Board met on December 29, 2003 to discuss the latest demand made by Mr. Fougnier on behalf of the Oneida Nation, and rejected it.

Stockbridge Valley School Board President, Michael Cot said that, "There is no basis in the law for the termination of an employee simply because a fund donor demands it. It would be improper for the School District to enmesh itself in this dispute. I also feel that it is inappropriate and unfair for the Nation to use its financial pledge to this community to force the District to discharge an employee without just cause in order to sanction that individual for an intra-tribal disagreement. This dispute is a real distraction from the District's educational mission and raises the potential for damage to our school operations."

Superintendent Richards said that the proposed revocation of this funding may have a dramatic impact on the ability of the school to fund programs, and would likely result in significant cuts. He noted that this not the first time the District has had to deal with dramatic revenue loss and, should the Nation choose to withhold the funds, the school would attempt to weather the storm as it has in the past.

The Board and the administration are now confronted with many difficult choices in the face of the finding loss. Dr. Richards indicated that, even if the promised finds are restored, the school would no longer be able to consider the funds as part of the school's revenue stream as it had in the past. "I am advised that last year we were short $10,000 of anticipated income when the Nation decided that it would

reduce Silver Covenant Funding by that amount and instead use that money to fund a scholarship for two students at the school. We were assured at that time that the $10,000. would be restored to the Covenant, but it was not. "Since they were using the money to fund the scholarships, it would seem at this point that those scholarships are gone as well."

Dr. Richards indicated that, on January 7th, the district received a letter from Dr. Peter Golia, Special Assistant to the Nation Representative. Which indicated that the Nation had concerns over the Districts understanding of the relationship among the nation, school, and the "voluntary" education grants. According to Superintendent Richards, Dr. Golia's letter did not address the earlier demands made by nations representative Chuck Fougnier for the firing of a native American school employee. I was hopeful "that we could develop a dialog with Dr. Golia to address and resolve those other concerns, and I immediately wrote to Dr. Goliato set up a meeting, said Dr. Richards." However, my staff and I have fried calling Dr. Golia on five occasions since then and have been told that Dr. Golia is busy said" Dr. Richards.

Oot and Richards indicated that the Board hoped that the rift between the School District and the Nation could be quickly healed. "We have demonstrated ourselves to be good neighbors to the Nation. The children of the Oneida have been educated here in Stockbridge Valley for generations, and more recently, access to the school has been extended to Oneida children who live outside of the district. The Silver Covenant Funds benefit these and all the children of the District."

Excerpt from: *Oneida Daily Dispatch*
(January 12, 2004)

SVCS faces budget cuts in wake of grant loss
Board will meet Tuesday to discuss budget changes

By Elizabeth Rinaldo
Dispatch Staff Writer

MUNNSVILLE - Stockbridge Valley Central Schools Superintendent Randy Richards said the district will have to make budget cuts, which could affect programs or personnel, because the Oneida Indian Nation has revoked a $120,000 Silver Covenant grant.

Richards made the announcement at a press conference Saturday morning, where he also addressed concerns of community members.

"The impact is pretty severe," Richards said of losing the money. "But I urge the community not to panic. We will get through this."

Richards told the community he has tried several times to arrange a meeting with the Nation to resolve the conflict, with no success.

"When I was told we wouldn't be receiving the money, I asked for a meeting," Richards said. "I was told there would be nor more meetings."

Richards also said he has called the Nation "every day this week," but has gotten no response.

The Nation is refusing to provide the district with the Covenant, which the Nation describes as a "friendship gift," unless the district fires Monica Antone, a teacher's aide, who

runs a Native American program at the school. Antone mentors Native American students, working with them both academically, as well as teaching Native American culture, lessons in nature, and taking them on field trips.

The program, formally known as Title VII, is a federally funded program; Stockbridge Valley is the only school in the area that receives the money and has been participating in the program since the mid-90s.

Richards said he was told by the Nation not to apply for the federal funds any longer, but the Oneida Indian Nation is in no way associated with the implementation of the federal program.

"We maximize an opportunity for federal money," Richards said. "And we educate Native American students in our school. It would be irresponsible not to apply for the money."

About 60 students at Stockbridge Valley are Native Americans; more than 40 of them participate in the program.

The Nation says Antone brings her conflicts with the Nation into the school and the classroom, including her opposition to Nation leader Ray Halbritter.

Richards said both he and two previous administrators investigated those claims, finding them unsubstantiated.

Furthermore, the Nation says parents have complained to the Oneida Men's Council and Clan Mothers about Antone and several occasions, although no parents brought that concern to the school board.

"The first we heard about this was from the Nation," Richards said.

He said no students have brought any concerns about Antone to him or the board either.

The district also had the program reviewed by a professor at SUNY Buffalo who issued a report, which included suggestions of greater involvement with the Nation. The district forwarded that report to the education department at the Nation in October, asking for suggestions and a possible cooperation. He said the Nation has not responded to that request, or commented on the report.

Richards said the Nation told him either to fire Antone, or lose the Silver Covenant.

Antone is a tenured employee at the school. In order to be granted tenure, an employee must have at least three years of satisfactory service to the district, as well as positive evaluations. Once an employee has tenure, New York State Education Law mandates a process that must be completed in order to terminate that employee. Richards said, in this case, that is not necessary.

"This person does a good job for us," he said. "I'm open to solutions, but firing her is not one of them."

Richards said he tried to explain to the Nation that it would violate federal law if he fired Antone. It didn't seem to matter.

They were unflinching," he said. "They were firm in their demands that she be removed."

The board of education will hold an emergency meeting Tuesday at 6:30 in the high school library to discuss the next steps for the district. Richards said any decisions about budget cuts will be made at that meeting, which is open to the public.

"There will not arbitrarily be $120,000 of cuts across the board," Richards said. "We've had to deal with budget cuts before. We provide a good education to our students and we've always done it economically. We will get through."

Richards said there was some reserve money that will help with the loss, and he has also contacted local legislators to see if the state can help replace some of $120,000.

Stockbridge Valley is the only school district losing the Silver Covenant funds and the Nation has said that the scholarship portion of the program will continue.

Richards is firm in his belief that no matter what happens, the school will not sacrifice Antone or the program to the demands of the Nation.

"It's tough to do the right thing," he said, "but this is the right thing."

For her part, Antone is appreciative of the backing she's received from the district.

"They all support me highly," she said. "I still can't believe they've (the Nation) tried to put their political motives into the school, where the kids are trying to learn."

"They are taking the money away from the kids," Antone said.

1788 Treaty of Fort Schuyler Between New York State and the Oneida Indians

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At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas – it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly, Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas

shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and furtner notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the

Stockbridge indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly, In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the

lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly, The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto intercheangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE

KANAGHGWEYA
PETER OTSIQUETTE
THAGHNIYONGO
THONIGWEAGHSHALE
TEHEAND 'YAKHON
OGISTALALE *alias* HANYURRY
OTSETOGON
TEYOHAGWEANDA
ONEYANHA *alias* BEECH TREE
THAGHNEGHTOLIS *alias* HENDRICK
S' HONOUGHLEYO *alias* ANTGONY
THAGTAGHGUISEA
HANAGHSALILGH
GAGHSAWEDA
TYAGHSWEANGALOLIS *alias* DOMINE PETER
JOHEGHSLISHEA *alias* DANIEL
THANIGEANDAGAYON
ALAWISTONIS *alias* BLACKSMITH
KEANYAKO *alias* DAVID
KAKIKTOTON
SAGOYONTHA
HANNAH SODOLK
TEHOUGHNIHALK HANWAGALET
KASKONGHGWEA KANWAGALET
HONONWAYELE
SKENONDONGH
GEORGE CLINTON
WM. FLOYD
EZRA L'HOMMEDIEU
RICHARD VARICK
SAMUEL JONES
EGBERT BENSON
PETER GANSEVOORT, JUNR.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)

To all to whom these presents shall come, the underwritten John Lowell, James Sullivan, Theophilus Parsons and Rufus King, agents or commissioners appointed by the Commonwealth of Massachusetts, of the one part, and the underwritten James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith and Egbert Benson, six of the agents or commissioners appointed by the State of New York, of the other part, send greeting:

WHEREAS, The Commonwealth of Massachusetts did heretofore present a petition to the United States, in Congress assembled, thereby among other things stating that all that territory which in the said petition is described as "All that part of New England in America which lieth and extendeth between a great river called Merrimac, and a certain other river, Charles river, being the bottom of a bay then called Massachusetts bay, and also those lands lying within three English miles to the southward of the southernmost part of the said bay, and extending thence northward in latitude to the northward of every part of the said river Merrimac, and in breadth of latitude aforesaid, extending through all the main-land in longitude westwardly to the southern ocean," was the just and proper right of the said commonwealth; and further stating that the State of New York had set up a claim to some part of the land before mentioned; the said commonwealth did therefore by the said petition solemnly request of the United States in Congress that commissioners might be appointed for inquiring into and determining upon the claim aforesaid of the Legislature of the said commonwealth, and that such other proceedings respecting the premises might be had as are by the federal government of the said United States in such case made and provided, as by the said petition filed among the archives of the United States, reference being thereunto had may more fully appear; and

WHEREAS, The State of New York doth, in opposition to the said claim of the Commonwealth of Massachusetts, claim as the just and proper right of the said State, as well in respect of property as jurisdiction, all those lands, territories, bounded on the north by the parallel of latitude passing through the said point, place or boundary aforesaid of three miles to the northward of every point of the said river Merrimac, and bounded on the south by the parallel of latitude passing through the said point or place situate three miles south of the southernmost point on the said bay, called Massachusetts bay, bounded on the west by the limits between the United States and the King of Great Britain, by the line of cession from the State of New York to the United States, and bounded on the east by the line agreed on and established between the late colony of Massachusetts Bay and the late colony of New York, in the year 1773; and from the northern terminal of the said line, then bounded on the east by the western bank of the Connecticut river; and

WHEREAS, The State of New York, having been duly notified, did appear by their lawful agent to vindicate such their said right against the said claim of the said commonwealth, and proceedings were thereupon had in Congress pursuant to the Articles of Confederation, in order to the appointment of commissioners or judges to constitute a court for hearing and determining the said matters in question; and

WHEREAS, The said John Duane, James Sullivan, Theophilus Parsons and Rufus King were afterwards, by a certain commission under the seal of the said commonwealth, and bearing date the twenty-sixth day of April, in the ninth year of the independence of the United States, and made in pursuance of an act of the Legislature of the said commonwealth, passed the fourteenth day of March, in the eighth year of the independence of the United States, and of a resolution of the said Legislature, passed the eighteenth day of the said month of March, commissioned to be agents to

manage, conduct and prosecute the claims of the said commonwealth to the lands described in the said petition; and

WHEREAS, Afterwards and pending such proceedings in Congress, the Legislature of the Commonwealth of Massachusetts did, by an act entitled "An act empowering the agents appointed by this government to defend the territory on the west side of Hudson river against the claims of the State of New York, to settle the controversy relative thereto, otherwise than by a federal court if they shall judge it expedient," enact that the major part of said agents or commissioners shall be fully authorized and empowered to agree with the agents or commissioners of the State of New York and settle the controversy respecting the territory aforesaid by a federal court as appointed by virtue of the confederation or otherwise, in such way and manner as they should judge would comport with justice and the interest of the said Commonwealth, and the Legislature of the State of New York did by an act entitled "An act supplementary to the act entitled 'An act to appoint agents or commissioners for vindicating the right and jurisdiction of this State against the claims of the Commonwealth of Massachusetts, pursuant to the articles of confederation and perpetual union of the United States,'" among other things enact that it should be lawful for the said James Duane, Robert R. Livingston, Egbert Benson, John Haring, Melancton Smith and Robert Yates, and also John Lansing, Jr., or any five or more of them to settle said controversy between the said State of New York and the said Commonwealth of Massachusetts, otherwise than by the said federal court in such manner as they should judge most conducive to the interest of the said State, as by the said commission and the said several acts, relation being thereunto had, may appear.

Now, therefore, know ye, that the underwritten commissioners on the part of the Commonwealth of Massachusetts and State of New York respectively, having by mutual consent assembled at the city of Hartford, in the State

of Connecticut, on the thirtieth day of November last, in order to the due execution of their respective trusts, and having duly exchanged and considered their respective powers and declared the same legal and sufficient after several conferences, and to the end that all interfering claims and controversies between the said Commonwealth of Massachusetts and the State of New York, as well in respect of jurisdiction as property, may be finally settled and extinguished, and peace and harmony forever established between them on the most solid foundations have agreed, and by these presents do mutually for and in behalf of the said Commonwealth of Massachusetts and the said State of New York by whom, respectively, they, the said commissioners, have been so appointed and authorized as aforesaid, agree to the mutual cession, grant, release and other provisions following, that is to say:

First. The Commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York, forever, all the claim, right and title, which the Commonwealth of Massachusetts hath to the government, sovereignty and jurisdiction of the lands and territories so claimed by the State of New York, as hereinbefore stated and particularly described.

Secondly. The State of New York doth hereby cede, grant, release and confirm to the said Commonwealth of Massachusetts, and to the use of the Commonwealth, their grantees and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians, and all their estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York hath of, in or to 230,400 acres, to be located by the Commonwealth of Massachusetts, and to be situate to the northward and adjoining to the lands granted respectively to Daniel Cox and Robert Lettice Hasper, and their respective associates, and between the rivers Owego and Chenango, and also of, in or to all the lands and territories

within the following limits and bounds, that is to say: Beginning in the north boundary line of the State of Pennsylvania, in the parallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of Pennsylvania, on the Delaware river, as the said boundary line hath been run, and marked by the commissioners appointed by the States of Pennsylvania and New York respectively, and from the said point or place of beginning running on a due meridian north to the boundary line between the United States of America and the King of Great Britain; thence westerly and southerly along the said boundary line to a meridian which will pass one mile due east from the northern termination of the strait or waters between Lake Ontario and Lake Erie; thence south along the said meridian to the south shore of Lake Ontario; thence on the eastern side of the said strait by a line always one mile distant from and parallel to the said strait to Lake Erie; thence due west to the boundary line between the United States and the Kind of Great Britain; thence along the said boundary line until it meets with the line of cession from the State of New York to the United States; thence along the said line of cession to the northwest corner of the State of Pennsylvania; and thence east along the northern boundary line of the State of Pennsylvania to the said place of beginning, and which said lands and territories so ceded, granted, released and confirmed are part of the lands and territories described in the said petition.

Thirdly. The Commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York and to the use of the State of New York, their grantees, and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians and all other the estate, right, title and property which the Commonwealth of Massachusetts hath, of, in, or to the residue of the lands and territories so claimed by the State of New York as hereinbefore stated and particularly specified.

Fourthly. That the lands so ceded, granted, released and confirmed to the Commonwealth of Massachusetts, or such part thereof as shall from time to time be and remain the property of the Commonwealth of Massachusetts, shall during the time that the same shall be and remain such property, be free and exempt from all taxes whatsoever, and that no general or State tax shall be charged on or collected from the lands hereinafter to be granted by the Commonwealth of Massachusetts, or on the occupants or proprietors of such lands, until fifteen years after such confirmation as is hereinafter mentioned of such grant shall have expired, but that the lands to be granted and the occupants thereof shall, during the said period, be subject to town and county charges or taxes, only from deeds that this exemption from general or State taxes shall not be construed to extend such duties, excises or imposts to which the other inhabitants of the State of New York shall be subject and liable.

Fifthly. That no rents or services shall be reserved in any grants to be made of the said lands by the Commonwealth of Massachusetts.

Sixthly. The inhabitants on the said lands and territories being citizens of any of the United States, and holding by grant from the Commonwealth of Massachusetts, shall be entitled to equal rights with the other citizens of the State of new York, and further that the citizens of the Commonwealth of Massachusetts shall from time to time, and at all times hereafter, have and enjoy the same and equal rights respecting the navigation and fishery on and in Lake Ontario and Lake Erie, and the waters communicating from one to the other of the said lakes, and respecting the roads and portages between the said lakes, as shall from time to time be had and enjoyed by the citizens of the State of New York. And the citizens of the Commonwealth of Massachusetts shall not be subject to any other regulations or greater tolls or duties to be made or imposed from time to time by the State

of New York, respecting the premises, than the citizens of the State of New York shall be subject to.

Seventhly. That no adverse possession of the said lands for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts.

Eighthly. That the State of New York, so long as any part of the said lands shall be and remain the property of the Commonwealth of Massachusetts, shall not cede, relinquish or in any manner divest themselves of the government and jurisdiction of the said land, or any part thereof, without the consent of the Commonwealth of Massachusetts.

Ninthly. That the Commonwealth of Massachusetts may from time to time, by persons to be by them authorized for the purpose, hold treaties and conferences with the native Indians relative to the property of right of soil of the said lands and territories hereby ceded, granted, released and confirmed to the Commonwealth of Massachusetts, and with such armed force as they shall deem necessary for the more effectual holding such treaty or conference; and the Commonwealth of Massachusetts, within six months after such treaties shall respectively be made, shall cause copies thereof to be deposited in the office of the Secretary of the State of New York.

Tenthly. The Commonwealth of Massachusetts may grant the right of preemption of the whole or any part of the said lands and territories to any person or persons who by virtue of such grant shall have good right to extinguish by purchase the claims of the native Indians, providing, however, that no purchase from the native Indians by any such grantee or grantees shall be valid unless the same shall be made in the presence of and approved by a superintendent to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such

purchase shall be confirmed by the Commonwealth of Massachusetts.

Eleventhly. That the grantees of the said lands and territories under the Commonwealth of Massachusetts, shall within six months after the confirmation of their respective grants, cause such grants or the confirmation thereof or copies of such grants or confirmations, certified or exemplified under the seal of the Commonwealth of Massachusetts, to be deposited in the said office of Secretary of State of New York, to the end that the same be recorded there, and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said Secretary their respective grants or confirmations or the copies thereof, whichever may have been so deposited, without any charge or fees of office whatsoever; and every grant or confirmation which shall not, or of which such copies shall not be so deposited shall be adjudged void.

In testimony whereof, the said John Lowell, James Sullivan, Theophilus Parsons and Rufus King for and in the name and behalf of the said Commonwealth of Massachusetts, and the said James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith and Egbert Benson for and in the name and on behalf of the said State of New York, have to these presence and a duplicate thereof, both intended interchangeably, set their hands and affixed their seals.

Done at the city of Hartford, aforesaid, the 16th day of December, in the year of our Lord 1786, and the eleventh year of the independence of the United States of America.

To the first question I answer, that the legal titles of the States of New York and Massachusetts, and of the grantees under them, as settled and established by the convention of 1786, are not divated, or in any manner impaired, by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

The convention of 1786 being an arrangement of compromise between the States of Massachusetts and New York, as to rights then existing in those States, could not be affected by a matter transacted between other parties, as the treaty of Canandaigua was; the latter being a convention between the United States and the Six Nations, neither of which parties was authorized to transfer or in any manner to modify the separate and pre-existing rights of those individual States.

The character of the Indian right to lands within the limits of the United States, or within those of the territories claimed by the sovereigns of Europe, has never been defined with precision, so far as I am informed. The Supreme Court has decided that a State may make a valid grant to pass the seizin of lands lying within its limits, although the Indian title to such lands has not been extinguished. A title of some sort is thus acknowledged to exist in the Indians, and such a title, too, as cannot be extinguished without their consent. It is a title, too, which, however narrow in other respects, is a title in fee simple, or, at least, a title of perpetual inheritance, because it will be admitted, on all hands, that neither the present occupants nor their heirs, so long as the nation subsists, can be rightfully driven from their possessions. Yet it is a fee without the right of alienation, (a legal anomaly), because the

Christian Sovereigns of Europe, who had the physical power to give the law on this subject, have said that, by virtue of the possession which they took of this country when held by barbarians, the right of domain vested in them respectively, and that there can be no valid grant but such as proceeds from the Crown.

It would be vain, at this time of day, to moralize on this subject. More confusion and more suffering would result from the attempt to draw back the question of Indian title to the fundamental principles of human right, than from the endeavor to settle it on its present basis, with all the precision in our power.

The States occupying, by the treaty of 1783 with Great Britain, precisely the same ground towards the Indians which the British King occupied, the Indian possessors of the soil cannot by any act of their prejudice the sovereign right of the State within which they dwell, any more than they could by such act formerly prejudice the right of the British Crown. The right of sovereignty and the right of soil being in the Crown, the Indian occupant could not alienate but with the sanction and by the grant of the Crown; the Indians having neither the right of sovereignty nor of soil, and not holding under a grant from the Crown, could be considered as keeping the possession by the acquiescence and at the will of the Crown. And the right on the part of the Indians, either to hold or to sell, being a right derived in legal contemplation from courtesy of the Crown merely, could be exercised in such way only as the Crown should appoint.

As to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place, as stated in the case hereto annexed.

The use of the lands themselves is less definitely settled. A lease of the lands, being considered as an

alienation, has been declared invalid. A lease is an authority to cultivate the lands and reap the crops. This authority, it is conceded, the Indians have no right to give. How then do they acquire the right to alienate the natural productions of the soil, the timber growing on it? I incline to the opinion that the use of the lands permitted to the Indians is to be considered as personal to themselves; as intended for their subsistence, and looking to their personal occupation of it; and, although they have the right to cultivate and sell the crops, which are the production of their own labor, they have no more right to sell the standing timber, the natural production of the soil, as an article of traffic, than they have to sell the soil itself.

Lord Coke says that a grant of woods, or of woods growing, passes not merely the woods, but the land also. For this is not a right essential to the purpose of subsistence, for which alone, I presume, they are permitted to retain the possession. If they can sell any part of the standing timber, they may sell the whole by one contract; and the right to sell the timber, carrying with it the right to give the means to cut and carry away the timber, the Indians, according to this hypothesis, have the right to alienate the possession of the soil to the vendees of the timber, until the whole of it shall be cut and carried away. Does such an authority comport with that qualified right which prohibits the Indians from leasing the land for one year? Would it be permitted by the sovereign claiming the paramount right of the soil? If it would, of what value would the soil be, divested of its timber, to an immeasurable extent?

This restriction upon the Indian right may be at first revolting to us; but are not all the restrictions on their aboriginal rights of the same character? and is the restriction in question anything more than a consequence fairly deduced from the admitted restriction upon them, to alienate the lands by lease even for a single year?

I incline, therefore, to the opinion that, under the qualified right held by the Indians, they have no authority either to sell the land, or to make leases of it, or to sell the timber growing on the land; nor do I consider this opinion at all impugned by the course to which it is said the State of New York has sometimes resorted, to punish trespassers on the Indian lands. The Legislature of that State, for example, has, it is said, in some cases, directed actions of trespass to be brought by an officer, who is the guardian of the Indians, but the damages recovered are directed to be applied to the use of the Indians, and this has been considered as an acknowledgment that the right to the timber is in the Indians.

I do not perceive that this consequence necessarily follows from such a Legislative direction: for it may have been a gratuity or peace offering on the part of the Legislature; nor even if such a legislative provision is to be considered an admission that the Indians were entitled to the damages for the trespass on the timber, would it by any means follow that they had such a title to the timber itself as to have authorized the sale of it. They might have a right to insist that the timber should stand as cover for their game, as fuel for themselves, or to form enclosures for their fields. All this is perfectly compatible with that personal use of the lands which has been admitted, and to cut the timber would be a trespass against their right. Yet this right of property in the timber for *particular purposes* does not by any means carry with it the right to sell. Thus lessee for life or years on land has no property in the trees growing on the land. Even if the clause in the lease be without impeachment of waste, yet it gives him no property in the growing trees: yet if a stranger cut any of them down the lessee may maintain trespass; and his recovery shall be on account of his particular interest in the trees as for cropping and breaking his close, and perhaps for loss of shade, etc. (Esp. N., p. 384.) So that without such a property as would authorize him to cut and use the trees at pleasure, much less in sell them, such a tenant has nevertheless such an

interest in their remaining as they are as to authorize him to recover damages for cutting them down. Thus the special property which the Indians have in the timber may entitle them to the damages for cutting it down. Yet that general property which would authorize a sale of the timber cannot, it is conceived, be legally inferred from such a special property.

From this view of the subject, I am of opinion that those who occupy the lands in question, or cut the timber under contracts with the Seneca nation, act without authority.

Yet I do not think that the grantees of the soil under Massachusetts can maintain actions of trespass or waste against those unauthorized persons.

1. Not actions of trespass, because the plaintiff, in order to maintain such action, must prove that he was in actual possession at the time of the alleged trespass; such at least is the law of England, and such also, I understand to be the law of New York. (Campbell *vs.* Arnold, 1 John, 511, and Douglass *et al vs.* Valentine, 7 John, 273.)

2. Nor waste, because this is a remedy given (in the only instance approaching an analogy) to him who has the remainder or reversion of the inheritance after a particular estate for life or years in being. But the estate in being, of the Seneca nation, is not a particular estate for life or years. It is an estate (however limited in other respects) of perpetual inheritance; and there is no communion between the legal estate of the claimants under Massachusetts and that of the Indian proprietors; they are totally independent, and the relation, therefore, does not subsist between them which would authorize the Massachusetts grantees to institute waste either against the Indians or their agents.

The character of the Indian title is made an anomaly in our law, that I regret the shortness of the time which has been afforded me to consider these questions, and the constant

interruptions amid which I have had to form an opinion on them. The necessity of an immediate decision, however, leaves me no other course than to submit the opinion at once, crude as it may be.

Excerpt from: William N. Fenton, *The Great Law and the Longhouse* (1998)

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Congress had patented the Erie Triangle to Pennsylvania in 1792. This act intended to afford American traders an outlet on Lake Erie at Presque Isle. For two years the woods would be full of surveyors, whom the Indians regarded as a threat. In the autumn of 1793, after the unsuccessful peace mission to Detroit led by Pickering, Lincoln, and Randolph, a council at Buffalo Creek proposed Venango as the site of a general peace treaty to convene on 15 May 1794. Peace seemed possible, but between the fall hunt and spring planting, affairs took a turn, largely because of Dorchester's speech and Simcoe's strengthening of the forts. President Washington presented the matter to Congress with supporting documents, and he made representations to the British ambassador. Brant could not be counted on, and Cornplanter wavered from friendliness to near hostility.

But let us return to the council at Buffalo Creek in the autumn of 1793. Farmer's Brother delivered the word of the western confederates, speaking as if their words were his own. Both the British Indian superintendent, Colonel John Butler, and the United States Indian agent, General Israel Chapin, heard him. On inquiry they learned that the league between the Six Nations and the Shawnees had stood for "three lives," with the understanding that if either party were in distress, the other would come to its aid. The Shawnees now offered the Iroquois a place to come, bring their beds, and sit down. A Wyandot spoke through a large wampum belt, which pictured the Americans, the Six Nations in the middle, and themselves [647] at the far end, to express the Wyandots' sorrow that the American commissioners were gone before they could speak

to them. Brant arrived a day late to advance the Mohawk (British) position that claims to Indian lands were the persistent cause of wars with Indians; he insisted on some assurance on the boundary line issue.

These communications in Chapin's reports prompted Knox to issue invitations to the Indians in the president's name to treat at Venango, beyond British ears. Knox advised the western tribes to come by water to Presque Isle. Chapin delivered the invitation at a council held at Buffalo Creek in February 1794, and he attended again in April to hear the reply of the Six Nations. The president included the reports of these meetings among sundry papers that he laid before Congress. Several factors caused the delay between invitation and reply: the Six Nations' desire to retire and consider the matter privately in council at the Seneca village, their submitting the invitation to the British for scrutiny, and the hardening of the British attitude as reflected in Dorchester's speech. The boundary issue hung like a curtain between the parties. The Six Nations stalled for time on the pretext that some of the chiefs were afield.

By April, dark clouds hovered over the frontier from Canandaigua to Pittsburgh, and people quaked like the aspen before the gathering storm. A few strong individuals, both white and Indian, stand out like giant pines in the intervening forest. Chapin at Canandaigua and John Adlum, the Pennsylvania surveyor, heard the alarm but refused to believe that war would occur. Cornplanter and Red Jacket, leaders of opposite factions, prepared to withstand the storm. But it was the Onondaga Clear Sky whom the council chose to turn down the president's summons to Venango. Because of its importance, the council had considered the president's speech at length, but the sachems replied, "It is not now in our power to accept." After rehearsing their relations with the Americans during the decade since Fort Stanwix, Clear Sky stated: "In the absence of any pre-agreement on a boundary line, we cannot, at present, rise from our seats and attend your

council at Venango." He concluded by asserting the independence of both the Six Nations and the United States. They would put themselves under the protection of the Great Spirit. Although their patience might be worn, yet they wished for peace. Accordingly, they returned the invitation belt and the speech to Secretary Knox.

Unshaken, Chapin asserted that he did not believe that war would take place. He asked, Why do the Indians need be called out to forward the pretensions of Great Britain? They could rest assured that the president would not take up the tomahawk without warning them.

Canandaigua was an open town. Utica lay 112 miles east through unbroken forest, Buffalo some 100 miles west through oak openings. Chapin returned home to find the place in a flap. Townspeople urged erecting a blockhouse to shelter women and children should the Indians rise. Chapin opposed such evidence of fear lest it provoke a raid, but he did ask Knox to forward twelve hundred to fifteen hundred stand of arms and ammunition. Indians came and went daily without apparent unfriendly intention, although one story held that an Indian approached a white woman, circled the top of her head with his finger, and with a threatening look said, "Bime by [by-and-by] you." It was not in Chapin's official reports, but it was alleged that friendly sachems informed him that a council was set for September to determine whether settlements on the Genesee should be cut off. [648] Cornplanter assured Chapin that he would communicate the result by one of his swiftest runners. Should the runner bring bad news, Chapin thought there would be lead time for the women to reach Utica before war parties struck.

The council met, and when it reached a decision, Cornplanter, it was said, started a runner at daybreak with news for Chapin. Indian runners traveled in breechcloths and moccasins, carrying only parched corn and dried venison, and the frontier whites knew their gait as the "Indian lope" – a

long, swinging stride. Tension mounted while Chapin waited at home. As the sun sank behind Arsenal Hill, the runner came down Main Street. Chapin met him. "*The runner had made ninety miles upon the trail between the rising and setting sun of that day.*" Canandaigua was safe.

This record run was the talk of the town. What lends credence to the story is that the athlete was pointed out to Friends Emlen and Parrish when they came to Canandaigua that fall. Emlen identified him as "Sharp Shins" (Fenton, ed., 1965a: 296). Other runners took two and one-half days.

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Chiefs visiting Canandaigua that spring en route to Albany and returning insisted that the principal chiefs were the proper owners of the land, that Buffalo was the proper place of council, and that all officials who desired to do business with them must come there. They meant this for the governor of New York, and they remained adamant to the bitter end that Pickering observe the same protocol. Chapin honored their request three times during 1794. His willingness to observe the amenities of Indian protocol contributed to keeping them neutral. He assured them that the governor acknowledged them proper owners of the land and that they alone had the right to sell, and he then held that the governor had the right to purchase. Indeed, he quite wore out his moccasins on the path to Buffalo Creek; that summer he would exhaust himself traveling to Presque Isle to relieve the crisis over the Erie Triangle. By November he was a sick man who would die soon after the treaty.

In the eyes of the Buffalo Creek council, a few Indians, not the nation, had sold Presque Isle. Even Cornplanter, whom they accused of selling it, very much regretted having done so and now wanted relief from the terms of sale. He prepared to prevent its occupation. Pennsylvania, having acquired the northwestern lands in 1784

and the Erie Triangle by United States patent in 1792, was proceeding to survey and sell tracts for settlement. In the year preceding the treaty, the Pennsylvania assembly authorized laying out a town on Lake Erie. The following spring the governor sent an expedition under Captain Ebenezer Denny to fortify the port. He charged Denny to use extreme caution not to offend the Indians or alarm the British garrison. News of the move soon reached the Niagara garrison, which stirred up the Indians. It soon became apparent that both the Six Nations and the western Indians claimed this corridor. In their view it must stay open. The Six Nations foresaw that closing the corridor between them and the western confederacy spoiled their argument for recovering part of their lands. On this, Brant, the Buffalo chiefs, and Cornplanter were of one mind.

The tempers of the Six Nations were growing short. Learning that Denny had fortified Le Boeuf (Waterford), only sixteen miles from Presque Isle, the Buffalo Creek council summoned Cornplanter and the Allegheny chiefs to hear their [649] position. At Fort Franklin, General Wilkinson observed that "the English have soured their minds." The claims of the Six Nations rose with the military success of the western Indians and with British assistance. There would be no treaty at Venango that spring. The council sent a runner to Chapin, calling him to Buffalo to hear them refuse Knox's invitation.

A nasty murder brought the Presque Isle issue to a head. One May day a young frontier hothead, somewhat drunk, killed a Delaware Indian friendly to the garrison at the scene of the proposed treaty. Although the commandant at Fort Franklin arrested the offender, now the Indians had a real issue, and presents to the contrary, nothing short of Pennsylvanians' evacuating the area would satisfy them.

Communication was slow and confusing. Dispatch riders took a week between Canandaigua and Philadelphia, and equal time for the return; likewise from Fort Franklin via

Pittsburgh. Runners covered Buffalo Creek to Canandaigua in two days, summoning Chapin to council, while he waited for instructions. Secretary Knox yearned for reports, if only negative, by each post. Couriers passed between the War Office and the Pennsylvania governor. Small wonder that reports crossed orders and that the president counteracted the Pennsylvania governor and legislature. Cooperative federalism has never been simple.

By the end of May the president had decided it would be expedient to humor the Six Nations and suspend the Presque Isle establishment. Knox so informed Pennsylvania governor Mifflin. Chapin, sensing the policy drift but still lacking instructions, responded to the ~~Indian~~s' demands and reported the situation on 7 June. Through an agent he sought a personal interview with Brant, hoping to win him over to the United States. But he began to doubt the steadiness and reliability of Cornplanter, whom the British had lately loaded with presents. On returning home, Cornplanter had sent out runners calling a council at Allegheny, intending to descend on Venango and inquire into the circumstances of the murder. Responding to a runner from Buffalo, Chapin went as far as the Genesee and learned the purport of the message, but he deferred going on to Venango until his son returned from Philadelphia with instructions. The Indians agreed to wait. Chapin suspected that the reason Cornplanter had called the council was not the murder, but Cornplanter saw in it an opportunity to extricate himself from difficulties that had plagued him for ten years. Cornplanter and a few Senecas had sold the Presque Isle lands to Pennsylvania without the consent of the nation. No division of the money was ever made. He repeatedly denied having made the sale, which the nation held invalid. In the eyes of the Six Nations, Pennsylvania had sent troops to occupy lands owned by Indians. Cornplanter was indeed in a spot. Chapin sensed that the Venango meeting might be crucial for war or peace, and that it was his duty to attend. There he could confer with

Indians without British interference. Knox advised that the British were strengthening the garrison at the Miami rapids to nine companies, the obvious intention being to encourage the hostile Indians, to whom they were supplying arms and ammunition.

The president wanted the Indian war ended that year. Knox wrote Wayne that he did not think the British would seek a war with the United States just then, that he rather hoped Jay would succeed in adjusting any differences, and that the president had no intention that Presque Isle should upset negotiations in London [650] or bring the Six Nations down on the frontier. It was far cheaper to fund a treaty. To Chapin he sent a list of goods wanted by the Indians with instructions for distribution and accounting (Knox to Wayne in Knopf 1960: 327, 332; Knox to Chapin, O'Reilly Collection, 10: 16, NYHS).

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(2) The Treaty of Canandaigua, November 11, 1794.

(a) Events between 1784 and 1794. The New York Indians were not the only Indians who had taken sides with the British during the Revolutionary War and with whom it was necessary for the United States to negotiate treaties of peace and from whom the United States desired to obtain relinquishments of territorial [40] claims. Numerous Indians claimed or occupied parts of the area which later became known as the Northwest Territory (i.e., the area which today constitutes the states of Ohio, Indiana, Illinois, Michigan and most of Wisconsin) and were generally referred to, in the early days with which we are concerned, as "the western Indians."[27/] It was not until after the Battle of Fallen Timbers in August 1794 and the subsequent Treaty of Greenville in August 1795 that peaceful relations were established with these Indians.

The difficulties experienced by the United States with these Indians played a prominent part in the history of the period immediately following the Revolutionary War. That period (from the end of the Revolutionary War to the War of 1812) was a critical one in the history of the American struggle to establish a new and independent nation. (See

27/ Among the Indians generally designated as the western Indians were the Wyandots, Delawares, Shawnees, Chippewas, Ottawas, Pottawatomies, Miamis, Weas, Eel Rivers, Sacs, Foxes, etc.

Exhibit 61 for an exhaustive study of this period which particularly brings into focus the relation between Indians affairs and other events.) Britain had, after the war, determined upon a policy of treating the United States as an alien and rival nation and of awaiting the opportunity to undo the results of the war (Ex. 59, pp. 209-210). Among other things she refused to give up the frontier posts and attempted to keep alive warfare between the Indians and the United States (Ex. 59, pp. 227-229; Ex. 61, especially pp. 1-7, 11-17, 133, 161; see also Ex. 23, pp. 349-350). It was for a long period a British desire to set up a [41] barrier Indian state between Canada and the United States and to prevent the Indians from making peace and territorial cessions to the United States (see Ex. 61, especially pp. 14, 16, 109-133, 161, 263-264; see also Exs. 51, 53). The period between 1784 and 1794 marked one phase of this epoch and culminated in three treaties, two with the Indians and one with Great Britain, i.e., the Treaty of Canandaigua, November 11, 1794, with the Six Nations or New York Indians; the Jay Treaty, November 19, 1794, with Great Britain; and the Treaty of Greenville, August 3, 1795, with the so-called "western" Indians.

Efforts of the United States to establish peaceful relations with the Indians prior to these treaties were briefly as follows:

As we have already related, the United States, on October 22, 1784, about a year after the peace treaty of 1783 with Britain, entered into a peace treaty with the Six Nations (New York Indians) as Fort Stanwix (7 Stat. 15-16, Ex. 19, supra pp. 27-28, 31-33). Immediately thereafter, the Continental Commissioners proceeded to Fort McIntosh (near the junction of the Ohio River and Beaver Creek or River in the vicinity of the present town of Beaver, Pennsylvania) where a treaty of peace was concluded on January 21, 1785, with a portion of the western Indians, i.e., the Wyandots, Delawares, Chippewas and Ottawas (7 Stat. 16, Ex. 19; see Ex. 18, pp. 357, 391). It was not until January 31, 1786, that

a treaty was concluded with the Shawnees (7 Stat. 26-27, Ex. 22). Others of the western Indians were hostile, efforts to hold peace treaties [42] were unsuccessful, and it was feared that their hostile disposition would spread to the Indian nations already at peace with the United States (Exs. 23, 24, 25, 27).[28]/ On January 9, 1789, the treaties of Fort Stanwix (October 22, 1784) and Fort McIntosh (January 21, 1785) were confirmed at Fort Harmar by treaties with the Six Nations, the Wyandots, Delawares, Ottawas, Chippewas, Pottawatomies and Sacs (7 Stat. 28-35, Ex. 39; see also Exs. 28, 29, 34, 38). Hostilities continued on the part of many of the western nations and on November 4, 1971, the troops of General Arthur St. Clair, the Governor of the Northwest Territory, were defeated (Ex. 42). Early in 1792, as part of their efforts toward peace and to persuade the Indians of the friendship and good intentions of the United States, the President, through the Secretary of War, invited chiefs of the Senecas and others of the Six Nations to come to Philadelphia (Ex. 44, pp. 226-228). During that visit the United States agreed with the "five nations of Indians so called, being the Senecas, Oneidas, and the Stockbridge Indians incorporated with them, Tuscaroras, Cayugas and Onondagas" that it would "in order to promote the happiness of the five nations of Indians * * * cause to be expended annually the amount of one thousand five hundred dollars, in purchasing for them clothing, domestic animals and implements of husbandry, and for encouraging useful artificers to reside in their villages" (Ex. 44, p. 232; see Exhibit A, Dkt. 300, Pet. P. 9). [43] Hostilities with the western Indians still continued throughout this period and in 1794 there appeared to be danger that the New York Indians, or at least the Senecas, might take up arms against the United States. The matter which precipitated a

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28/ Although a treaty had been reached with the Shawnees in January 1786, they are frequently listed among the hostile Indians in the above documents.

crisis in relations with the New York Indians was action taken by Pennsylvania toward establishing a town at Presq' Isle (Presqu' Isle is the present site of the city of Erie, Pennsylvania, and is within the so-called Erie Triangle, see supra, pp. 9-10). On April 8, 1793, the General Assembly of Pennsylvania, stating that "Whereas establishing a town at Presqu' Isle would promote the settlement of the neighboring country and thereby place the frontiers of Pennsylvania in a safer position," enacted legislation authorizing the laying out of a town at Presq' Isle (Ex. 46, p. 503). When surveyors and garrisons were sent to the area, the Indians indicated sufficient hostility to alarm the President. Accordingly, acting through the Secretary of War, he requested on May 24, 1794, that the establishment at Presqu' Isle be suspended (Ex. 47). The Governor of Pennsylvania, deferring to the general government on a matter of war and peace, readily complied (Ex. 46, p. 506; Ex. 47, p. 713). In June the Indians held a council at Buffalo Creek which was attended by General Israel Chapin, United States Indian Agent in New York (Ex. 49). Chapin reported that the Indians were particularly agitated regarding Presqu' Isle (Ex. 48) and suggested that a treaty be held with the Six Nations to settle their differences with the United States (Ex. 48, pp. 520-521). It was thereupon determined to hold a treaty "for the purpose of amicably removing all causes of [44] misunderstanding and establishing permanent peace and friendship between the United States and the Six Nations" (Exs. 49, 50). Timothy Pickering, who was appointed to act as commissions on behalf of the United States, held a conference at Canandaigua,[29]/ New York, which resulted in the Treaty of November 11, 1794 (7 Stat. 44, Ex. 52).

29/ Sometimes spelled Kon-on-daigua, Kanandaigua, Canandarqua, etc.

(b) The Treaty of 1794. By Article I of this treaty, peace and friendship were established between the United States and the Six Nations.

Article II provides as follows:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

The reservations referred to, and the treaties with the state of New York by which they were created, are set forth, supra, pp. 16-17.

Article III provided as follows:

> The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles [45] eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork,

> continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelp's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indians friends residing thereon and united with them, in the free use and enjoyment thereof; but in shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Thus, it appears that the eastern boundary of the lands acknowledged as belonging to the Senecas was the western boundary of the lands sold by the Six Nations to P helps and Gorham on July 8, 1788, as set out supra, pp. 13-14. It also

appears that part of the lands acknowledged to belong to the Senecas were west of the boundary line established at Fort Stanwix in 1784 and that the United States, by acknowledging them as Seneca lands, relinquished the rights ceded to it at Fort Stanwix (see Exhibit B showing the [46] Fort Stanwix boundary line and the western boundary of the Seneca lands as acknowledged in the treaty at Canandaigua).

Article IV of the treaty provided as follows:

> The United having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the fee use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.[30]/

Inasmuch as the lands acknowledged as belonging to the New York Indians lay entirely within the state of New York, the effect of the Indian engagement never to claim any other lands within the boundaries of the United States was to relinquish any claim to the disputed Erie Triangle, as well as to any other lands in Pennsylvania or elsewhere in the United States.

The Treaty of Canandaigua in no wise divested or impaired the rights of the states of New York or Massachusetts, nor did it enlarge the rights of the Indians.

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[30]/ The Mohawks had gone to Canada and were, therefore, not mentioned in the treaty.

See opinion of Attorney General Wirt, March 26, 1819 (Ex. 58, pp. 475-476); see also opinion of Richard Harrison, April 6, 1819 (Ex. 58, pp. 471, 475).

It is apparent on its face that the treaty was not intended to and did not create any greater rights in the Indians than had existed previously, with the exception of the area referred [47] to above which lay between the Fort Stanwix line and the western boundary of the Seneca lands as described in the Canandaigua treaty.[31]/ In the first place it recognizes the right of the state and Phelps and Gorham to purchase Indian title by describing the lands currently belonging to them by reference to the transactions which had occurred previously between the Indians and the states of Massachusetts and New York and Phelps and Gorham. And the very language used to spell out the undertaking by the United States is an explicit acknowledgement of that right. The treaty says "the United States will never claim the same nor disturb *** /the Indians/ *** in the free use and enjoyment thereof: but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." No other Indian treaty has been found which contains any such provision recognizing the right of the Indians to sell their lands to anyone other than the United States. This provision was an acknowledgment of the then well-known fact that either New York or those who had purchased the preemption right from Massachusetts had the right to purchase the Indian lands. Moreover, it was an acknowledgment that the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales to those "who have the right to purchase." Furthermore, it is a [48] recognition of the fact that the laws of New York (Exs. 1, 31), the treaties between

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[31]/ As to this area, the United States merely relinquished its claim. It is only to the extent that the Indians were relieved of any claim on behalf of the United States that they had a greater right than before.

New York and the Indians (e.g., Ex. 21), and the Hartford Compact (Ex. 26, p. 466) all placed restrictions on the purchase of Indian lands and that only certain persons had "the right to purchase." It is difficult to see how there can be read into the provisions of this treaty a guarantee by the United States that the Indians would be kept in possession of their lands in perpetuity or that the United States would see to it that they would receive any particular price for their lands when they sold them to New York or to the grantees of Massachusetts.

That the foregoing is the proper interpretation of the Treaty of Canandaigua is apparent from a draft of a letter dated December 26, 1794, from Pickering, the United States Commissioner, to Secretary of War Knox (Ex. 54).

As appears on Exhibit B attached hereto, part of the lands to which the Six Nations relinquished any claim at the Treaty of Fort Stanwix lay within the boundaries of the state of New York. In describing the lands which the United States by the Treaty of Canandaigua acknowledged to belong to the Seneca, Pickering bounded them on the west by a line which was west of the line laid down by the Fort Stanwix treaty. The effect, as has already been mentioned, was to relinquish any claim of the United States to an area within the state of New York lying between the two lines. When Knox received a copy of the Treaty of Canandaigua he apparently asked Pickering to explain why he had relinquished the right of the [49] United States to these lands.[32/] A draft of Pickering's reply (Ex. 54) is found among the Pickering Papers which are in the custody of the Massachusetts Historical Society in Boston. Pickering gave his reasons as follows:

32/ That such a request was made is obvious from Pickering's reply (Ex. 54). However, a copy of the request has not been found and it is possible that it was oral and not written.

1. I knew that the U. States had no right to any part of the Seneka Country, but by virtue of the cession made by the States of New York and Massachusetts, which congress had accepted.

2. I knew that the line of cession,[33/] when ascertained by Mr. Elliot, was what now constitutes the eastern boundary of the triangular piece of land which the U. States sold to Pennsylvania. ~~and consequently, that the U. States had no right to one feet of the land in question~~.

3. I knew that by the agreement between the two states of New York and Massachusetts, the pre-emption right to all the land in question belonged to Massachusetts; excepting a strip, a mile wide, along the strait of Niagara, which I understood New York was to retain; and that the whole lay within the Jurisdiction of New York.

4. I knew that by the Constitution of the State of New York, no purchase or contract for the sale of lands ~~within the state~~ made of or with the Indians, within the limits of that state, could be binding on the Indians, or deemed valid, unless made under the authority, and with the consent of the legislature of that state. And from the nature of the case, I knew that such authority and consent could never have been given, in regard to the lands [50] in question, when, ~~they were~~ in the terms of the treaty of Fort Stanwix, they were ceded to the United States.//

5. I knew, therefore, that the United States had no ~~proper title to~~ right to the lands which I

33/ I.e., the cession of territory by New York and Massachusetts to the United States.

relinquished. In truth, when I proposed to give up the tract between the Pennsylvania Triangle and the Meridian of the Mouth of Buffaloe Creek, I felt myself embarrassed – not in making the relinquishment itself – but for words to express it which should not be deceptive, ~~For while it might to impress the minds of the Indians with an idea that the relinquishment was of~~ by presenting an idea of something very valuable, while in fact the subject of the relinquishment was a shadow. The words used in my speech were these – "All this tract you, by former treaties ceded to the United States: but I am now willing to relinquish all their claim to it."

6. I knew the practical construction of the New York Constitution on this point. John Livingston and others obtained from the Six Nations a vast cession of land within that state, which had been made void, because done without the Consent of the Legislature, and I considered that the United States had no better right than individuals to ~~acquire a property in the same Indian lands~~ receive from the Indians (words crossed out) a cession of the same lands.

7. It is true, that I strenuously endeavored to obtain the strip of land four miles wide, along the strait of Niagara; and I also inserted an article to comprehend the land round the Fort of Oswego, to the extent of six miles square – because the same had been comprehended in the treaty of fort Stanwix, but not seeing how the United States exclusively could hold these lands I had draughted another article, in these words, "All the cessions & relinquishments of the rights & claims of the Six Nations & each of them hereby made, shall be for the benefit of the United States & any of them, and of any citizen or citizens thereof, to whom, accordingly to their laws and

usages, the right of taking & holding the same, does or shall belong." -- The form which the treaty finally assumed, superseded this provision. [51]

8. The objects of ~~my mission to~~ my conference with the Six Nations were, to remove from their minds all causes of complaint and to establish a firm & permanent friendship.

The great cause (words crossed out) of complaint, from all the Indian Nations,//Nations, it is too well known, has been the ~~unreasonableness~~ depriving them of their lands, by means not always honourable (words crossed out) too often fraudulent, & sometimes to an unreasonable extent.

The Six Nations, particularly the Senekas, have frequently complained of the treaty of fort Stanwix. Their complaints of that & of the subsequent treaties on the Ohio were renewed at the late conference. ***

Pickering went on to discuss the complaints of the Indians in this regard and expressed his belief that he was further justified in making the relinquishment because the purpose of the treaty was to settle differences with the Indians in order to preserve peace whereas to insist upon the kind of extinguishment of Indian title as had been obtained at Fort Stanwix would be to risk war.[34]/

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[34]/ Although Pickering was correct in his belief that the United States could acquire no title to lands in New York by cession from the Indians, he was not correct in believing that the United States had nothing to relinquish. The United States could have insisted upon the extinguishment of Indian title under the Treaty of Fort Stanwix for the benefit of the state or its grantees. See Clark v. Smith, 13 Pet. 195, 200-201 (1839); 30 Op. A.G. 284 (1914); Am. St. Pap. (Pub.

(Footnote continued on next page)

On the basis of the foregoing, it is obvious that Pickering was fully aware of the fact that the states, not the United States, had title to the lands, that he was aware of the New York-Massachusetts [52] Compact, and of the New York laws prohibiting purchases of Indian lands without the consent of the state. It is further clear that when he acknowledged certain lands to belong to the Indians he was recognizing their rights as derived from the states, that when he said that "the United States will never claim the same" he was relinquishing any rights previously acquired at Fort Stanwix by right of conquest and promising that "the United States" would assert no future claims to their lands and that when he said that the lands "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase" he acknowledged both the right of the Indians to sell and the right of the states or their grantees to purchase. It was a recognition only of rights which already existed and a disclaimer of any right in the United States to interfere. It was not an affirmative undertaking by the United States to take action of any kind much less to indemnify the Indians if it failed to take some undefined action.

Between 1794 and about 1850 numerous purchases of lands claimed by the Indians in New York were made either by the state of New York or the owners of the right of preemption which they had acquired by grant from the state of Massachusetts. As to these purchases, petitioners make the same contentions made regarding the Treaty of Fort Stanwix in 1784 (see supra, p. 35), i.e., that defendant failed in its duty expressed in the Treaty of 1794 to protect petitioners and keep

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(Footnote continued from previous page)

Lands), vol. 1, p. 532. However, as Pickering stated, the United States were under no obligation to extinguish the Indian title in New York except for their own benefit and he felt it unwise to insist upon the extinguishment when his purpose was to promote peace.

them secure in the use and possession of their lands and that it failed to lend any aid or assistance to [53] petitioners but permitted them to be exploited and to be unconscionably deprived of their lands for a grossly inadequate consideration (Docket No. 300A, Pet. par. 11; Docket No. 301, Pet. pars. 20, 25, 30, 45, 50, 52; Docket No. 342, Pet pars. 18, 23, 36, 65, 70, 86, 91, 95, 106; Docket No. 343, Pet. pars. 16, 20). As we have shown, the Treaty of Canandaigua clearly contemplated the sales which were subsequently made and the United States undertook no obligation with reference thereto. Consequently, there is no basis for imposing any liability upon the United States for claims arising out of such sales.

Finally, a few claims are based upon alleged trespasses and other wrongful acts by third persons. What has been said with reference to the purchases is ample to show that the United States cannot be held liable for these claims.

Opinion of Attorney General William Bradford
(June 16, 1795)

The attorney General has the honour of stating his opinion upon the question propounded to him by the Sec. of War, viz; whether the State of New York has a right to purchase from the Six Nations or any of them the lands claimed by those nations and situate within the acknowledged boundaries of that State without the intervention of the general government.

By the Constitution of the United States, Congress has power to regulate commerce with the Indian Tribes, and by the act of 1 March 1793, it is expressly enacted, that no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in Law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution that it shall be a misdemeanor in any person not employed under the authority of the United States in negotiating such Treaty of convention directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, [unclear notation].

The language of this act is too express to admits of any doubt upon the question unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law.

Nothing of this kind appears on the documents submitted to the attorney General. It is true, that by treaties made by the State of New York with the Oneidas, Onondagas and Cayuga, previous to the present Constitution of the United States, those nations ceded all their lands to the people of New York, but reserved to themselves and their prosperity

forever for their own use & cultivation, but not to be held, leased or in any other manner disposed of to others, certain tracts of their said lands with the free right of hunting and fishing. [And] so far, therefore, as respects the lands thus reserved the treaties do not operate further than to secure to the State of New York the right of preemption but subject to this right they are still the lands of those nations and their claims to them, it is conceived cannot be extinguished but by a treated holden under the authority of the United States, and in the manner prescribed by the laws of Congress.